

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 THE PHILLIES, a Pennsylvania
4 limited partnership,

5 Plaintiff,

6 v.

19 Civ. 7239 (VM) (SN)

7 HARRISON/ERICKSON,
8 INCORPORATED, et al.,

9 Defendants.

Telephone Conference

10 New York, N.Y.
11 February 13, 2020
12 4:35 p.m.

13 Before:

14 HON. SARAH NETBURN,

15 Magistrate Judge

16 APPEARANCES
17 (Via Telephone)

18 DUANE MORRIS, LLP
19 Attorneys for Plaintiff
20 BY: DAVID J. WOLFSOHN, ESQ.
21 TYLER R. MARANDOLA, ESQ.

22 MITCHELL SILBERBERG & KNUPP LLP
23 Attorneys for Defendants
24 BY: PAUL D. MONTCLARE, ESQ.
25 MATTHEW D. WILLIAMS, ESQ.

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1 THE COURT: Hi. This is Judge Netburn. Who do I have
2 on the phone?

3 MR. WOLFSOHN: Hi, your Honor. David Wolfsohn and
4 Tyler Marandola for plaintiff the Phillies. How are you.

5 THE COURT: Thank you.

6 MR. MONTCLARE: Good afternoon, your Honor. Paul
7 Montclare. I am here for Harrison/Erickson. I'm with Matt
8 Williams from my firm.

9 THE COURT: Thank you.

10 We're here with a court reporter so you can order the
11 transcript at the conclusion of these proceedings.

12 So we are here on the letter filed by the defendants
13 on February 7th. The plaintiffs responded the same day, and
14 then the defendants filed a letter yesterday responding, in
15 part, to the Phillies letter.

16 I understand that the two primary issues that need
17 resolution are where the depositions of Phillies employees
18 should be taken and then the scope of topics for the 30(b)(6).
19 Is that correct?

20 ALL COUNSEL: Yes, your Honor.

21 THE COURT: I forgot to give my preliminary speech,
22 which is, we're doing it by phone as a convenience to you all,
23 and so I hope you appreciate the courtesy, and your
24 appreciation can be shown by not speaking over one another and
25 by always identifying yourself. It's hard to tell who is

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1 speaking, so if you can always identify yourselves before you
2 speak so that the court reporter can properly attribute your
3 statements to the right person. Okay?

4 UNIDENTIFIED SPEAKER: Okay.

5 THE COURT: So why don't I hear first from
6 Mr. Montclare on the issue about locations.

7 MR. MONTCLARE: Thank you, your Honor. It's really
8 not a big issue. I just want to say at the beginning of this,
9 Mr. Wolfsohn and I have really tried to be courteous to one
10 another and we're trying to get this worked out in terms of
11 location. We've already scheduled two depositions of employees
12 of the Phillies in Philadelphia for convenience of the Phillies
13 personnel. And we did that because we thought it was the right
14 thing to do under the circumstances. One person was a little
15 older; and the other person had to go down for spring training,
16 and that deposition was held today. The remaining people who
17 are employees that we want to have in New York are really only
18 two other people now. It's Dave Buck's, who actually came up
19 the other day when our client's deposition was taken here; and
20 Scott Brandreth, who is an employee who I thought was going to
21 also attend the depositions up here that we took of our clients
22 last Friday and this Monday.

23 THE COURT: Sorry. Can you spell Scott Brandreth's
24 last name.

25 MR. MONTCLARE: Yes. B-R-A-N-D-R-E-T-H. And he's the

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1 marketing fellow over at the Phillies. And Dave Buck has also
2 been involved in settlement negotiations and has been involved
3 in this case. I'm not sure what his title is today. I think
4 it just changed recently.

5 In addition to that, we are going to be in Philly for
6 the depositions of nonemployees, all of whom really have agreed
7 to appear, with the assistance of Mr. Wolfsohn, who accepted
8 service on their behalf. But they are not employees. So we
9 are going to take those depositions down in Philadelphia.

10 The one thing I should -- I mean, the general rule is
11 pretty clear, I think, that, having decided to bring this case
12 in the Southern District, the plaintiff really, and its
13 employees, should appear here. There aren't too many reasons
14 for that not to happen. It's only an hour and a half away.
15 There's no inconvenience. They certainly have the money. It
16 may be that they don't want to, but, you know, I don't
17 necessarily want to go down to Philly either, especially when
18 you're taking depositions, if your Honor may be aware, because
19 you have all these documents to carry around.

20 The only other situs issue would have to do with the
21 30(b)(6) deposition, which should also be here, I think, for
22 the same reason. They're a party. And I don't know really --
23 I didn't see in any of the responsive papers anything that
24 amounts to any kind of burden or special circumstances that
25 should take us out of the normal rule that the party who starts

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1 the litigation in one place, in one forum, has to produce
2 witnesses in that forum. This court has held, and the Second
3 Circuit has affirmed, people come from as far away as Japan for
4 litigation in the Southern District. I'm not sure -- we have a
5 lovely office. We'll extend courtesies to Mr. Wolfsohn and his
6 clients. And I don't think it's an imposition. I just think
7 it may be inconvenient, but they started a very extensive
8 lawsuit and, you know, that comes with the territory of
9 starting a litigation.

10 THE COURT: Okay. Mr. Wolfsohn?

11 MR. WOLFSON: Thank you, your Honor. David Wolfsohn
12 for plaintiff the Phillies.

13 A couple of things, your Honor. When we discussed the
14 situs of the depositions for the two defendants, the two
15 personal defendants, I discussed it, we noticed them for
16 Philadelphia because our client wanted to attend. And
17 Mr. Montclare said it was a burden for them because they were
18 flying in from Florida and they didn't want to spend a weekend
19 in Philly and it was too hard, they wanted to be together, and,
20 you know, all this sort of stuff. So I agreed to take them in
21 New York, even though I had to schlep all the T-shirts and
22 dolls and documents up to New York for those depositions. And
23 Mr. Montclare agreed to do the Phillies depositions in
24 Philadelphia. So I thought we had resolved that issue. So now
25 I've taken those two depositions in New York, and now I think

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1 he's changing the rules of the game.

2 In his letter -- he didn't mention on the phone, your
3 Honor, but in his letter to the Court, he said that it's a
4 burden for his clients to travel to Philadelphia. When we
5 discussed the timing of their depositions, he said they weren't
6 going to be in New York other than for a couple of days, so
7 that's why I took those depositions last week. And that they
8 are in Florida. So if they want to come up for the
9 depositions, that's a little bit closer to come to Philly, and
10 definitely easier to get from the Philadelphia airport to our
11 offices than from, say, La Guardia or JFK to Manhattan.

12 So the bigger issue, your Honor, relates to the other
13 issue we're going to talk about today, and that's the 30(b)(6).
14 I don't know what your Honor's ruling is going to be, I don't
15 know what we'll be able to work out on that, but the way it is
16 right now, there's probably six or seven witnesses for those
17 topics. If I really am going to have to prepare somebody on
18 all of those 17 or 18 topics, it's going to be like six or
19 seven witnesses. And each one is going to testify for, I don't
20 know, half hour, 20 minutes, 45 minutes. I really don't want
21 to have to do seven separate 30(b)(6) depositions with each
22 person taking off a full day in New York or have seven people
23 take off two days to be in New York, not knowing how long the
24 examination is going to take for each one of them. So
25 especially, your Honor, for the 30(b)(6), that really should be

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1 in Philadelphia; unless it turns out that they don't do the
2 30(b)(6) at all, in which case it doesn't matter where it is
3 because it won't take place.

4 So in terms of our filing in New York, we spent a lot
5 of time figuring out where to file this case. I would have
6 preferred to file it in Philadelphia for any number of reasons.
7 Obviously I live here, so it's more convenient, and more
8 convenient for my client. We determined we didn't have
9 personal jurisdiction here, so we filed the case in the
10 Southern District of New York because we thought that this
11 either should be in the Southern District, potentially the
12 Eastern District, and so, you know, that's a good thing for the
13 defendants. They're in their home, or at least close. They
14 live in Brooklyn and Brooklyn Heights so they're pretty close,
15 so that's great. And I already took their deposition in
16 Manhattan.

17 And I'm not going to pretend, your Honor, that it's a
18 huge burden, but for the 30(b)(6), it really would be a huge
19 burden, and being a lot of people would have to take time off.
20 And the other thing is, you know, today, we had a deposition of
21 the current Phillies Phanatic, and it was like less than two
22 hours of questioning, you know, so, you know, we're going to go
23 up to New York, have people take off an entire day for like two
24 hours of questioning. I really think those depositions, since
25 we've done the depositions of the defendants in New York,

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1 should be in Philadelphia, but especially the 30(b)(6).

2 THE COURT: Okay.

3 MR. MONTCLARE: Your Honor, this is Paul Montclare.
4 Can I just respond quickly, your Honor.

5 It's not a big deal, except he really sort of
6 misstated a couple of things, probably unintentionally.

7 I never said we would take all the depositions of
8 Phillies people in Philadelphia. In fact, he was insisting on
9 taking these two people who are elderly -- one is blind -- in
10 Philadelphia. They were in Florida. They live in Brooklyn.
11 They came to Brooklyn, and we then went to the deposition. And
12 now they're here. So I don't know where he comes up with this
13 issue that he came up with.

14 With regard to, you know -- I said I would try to
15 accommodate some of his people. Bill Giles, who's a principal
16 witness in this case, is also elderly. I don't want him to
17 come up here unnecessarily. And that's a full day, and we'll
18 go a full day down there.

19 In terms of, you know, Dave Buck, the employee, he
20 came up to New York for the negotiations. These are very
21 sophisticated businessmen. This is an hour-and-a-half trip.

22 THE COURT: Okay. Okay. I think I've heard enough.

23 First, I want to commend you all for working
24 cooperatively, to the extent you have. That is really the best
25 way to practice, certainly before me, but I think generally.

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1 So I'm glad that you've been able to compromise your positions
2 and reach agreements. That is how you should continue. If you
3 are unable to continue with that practice, then the depositions
4 of the plaintiffs and its employees will be in New York. I
5 don't think it's such a burden to come up to New York from
6 Philadelphia. This is an incredibly important case to the
7 plaintiffs, and the case is pending in the Southern District of
8 New York.

9 So let's turn to the topics now. The list of topics
10 that I am looking at has 27 topics, and it was attached to the
11 defendant's February 7th letter, I believe. Is that the most
12 recent list?

13 ALL COUNSEL: Yes, your Honor.

14 THE COURT: Okay. So let's go through these as
15 quickly as we can.

16 I think part of the problem is, you know, in the
17 effort to be comprehensive, there is a fair complaint that you
18 are overinclusive, and so I think that the plaintiff is correct
19 that topics that request information about agreements, those
20 agreements can certainly be produced if they haven't already
21 been produced. So that includes topic 1, topic 2. I think
22 those are the ones that deal with agreements.

23 I'm going to put topic 1 and topic 2 together. They
24 seem to be about sort of relationships generally, a
25 relationship between the Phillies and MLB Properties and Major

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1 League Baseball generally. I think that relationship
2 concerning intellectual property rights writ large is too
3 broad, but certainly concerning the Phanatic is a reasonable
4 request. So I think so long as one is narrowed to be a focus
5 just on intellectual property rights concerning the Phanatic,
6 then topic 1 is a fair area of questioning.

7 With respect to topic 2, again, I think questions
8 about relationships with other agents, to the extent that there
9 are any, concerning the intellectual property rights in the
10 Phanatic is a fair area of questioning. To the extent there
11 are questions about other agreements, those should simply be
12 produced.

13 Question No. 3 asks for a lot of questions about
14 math -- revenue, receipts, profits, and totals earned. That
15 seems to me an area of discovery that is much better satisfied
16 through document production. Do the defendants not feel that
17 they've received adequate documentation responsive to No. 3?

18 MR. MONTCLARE: Yes. This is Paul Montclare. I don't
19 think we have received any information from the plaintiffs that
20 articulate for us the information that we've requested, the
21 total receipts, revenues, and profits by year.

22 And that really goes to another question, your Honor,
23 is that we have received no information -- no factual
24 discovery, at least -- that is tied to specifically their
25 damages claim, and we're getting towards the end of fact

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1 discovery here, and I know Mr. Wolfsohn is telling me that, you
2 know, he thinks this is all going to come in through experts,
3 but experts, you know, rely on facts, unless they don't, in
4 which case we have a *Daubert* problem. But I think my problem
5 is, I don't want to be in a position at the end of fact
6 discovery where I have no information tied to the damages
7 claims that allows me to prepare my experts.

8 The second part of that is that this information goes
9 directly to allegations in the complaint. They have said that
10 we asked for way too much money in settlement negotiations.
11 They've brought this whole settlement issue into this case. I
12 gave Mr. Wolfsohn an opportunity to withdraw all the
13 allegations relating to the settlement, and he said he didn't
14 want to do that. As a part of that, and we take the
15 position -- and it goes directly to the story in their case,
16 the allegations, and our response that, you know, they're
17 saying that this thing -- they said in settlement negotiations,
18 for example, that they made \$135,000 last year. I have a right
19 to test that. I don't believe it. Not because I don't believe
20 Mr. Wolfsohn. I just think whatever he was told, I need to
21 talk to his clients too and to Major League Baseball about
22 this. I don't think you can have a 34-page complaint saying
23 you spent millions of dollars, and this is the most famous
24 mascot in the world, and that we are trying to essentially
25 extort them for an amount of money that, you know, the

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1 Phanatic's not worth, and then just say, oh, I'm not going to
2 give you anything on these revenues, and by the way, I'm also
3 going to represent my agent, Major League Baseball, and they're
4 not going to give you anything. That's a complete stonewall on
5 an issue that I think is important.

6 THE COURT: Mr. Wolfsohn, you should be turning over
7 these documents. What's going on?

8 MR. WOLFSOHN: Your Honor, profits and revenues are
9 not relevant to this case. There's no claim by either party
10 for damages, either party, based on the revenues of either
11 party or the profits. And certainly the profits -- we have no
12 claim for lost profits. Our damages claim is solely based,
13 your Honor, on unjust enrichment theory, that we thought we
14 were getting the right to this intellectual property for the
15 full term of the copyright, not for only 35 years, so we say we
16 should get a prorated amount back -- if the Court rules against
17 us on some of these grounds, we should get back a prorated
18 amount of what we paid to the defendants. So our revenues are
19 not relevant. Our profits are not relevant. If we talked
20 about how much we made in merchandising in the settlement
21 negotiations, we don't allege that in the complaint, they don't
22 make any allegation in their answer or counterclaims about it,
23 then it's not relevant to the case. Just because we may have
24 talked about something in negotiations for settlement, doesn't
25 make it relevant to the claims or defenses that have been pled

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1 by either party. And that's why we haven't turned it over. We
2 objected to turning them over because we said they were not
3 relevant.

4 THE COURT: So Mr. Wolfsohn, if ultimately the Court
5 concludes that the termination notice was valid and you no
6 longer have the right to use the Phanatic, you're going to
7 seek, you know, half as much back from the defendants that you
8 paid them back in the '80s?

9 MR. WOLFSOHN: That would be a proportion. I don't
10 know if it's exactly 50 percent, your Honor, but a proportion
11 of the \$215,000 plus, depending on the Court's ruling. We've
12 paid them, over the last 40 years, in nominal dollars, about a
13 million dollars, the nominal, nonadjusted. So I don't know,
14 your Honor, I don't know that it's 50 percent, but some
15 percentage of what was paid. And that's it. That's the only
16 theory. There's nothing else. You can hold me to it. The
17 court reporter is taking it down. That's it.

18 MR. MONTCLARE: Your Honor, may I respond very
19 briefly. It's Paul Montclare.

20 THE COURT: Sure.

21 MR. MONTCLARE: Yeah, I mean, it's kind of
22 interesting. They could have pled the case exactly that way.
23 They didn't plead the case that way. They didn't tell us what
24 the damages are going to be. Now he's saying this is the way
25 he's going to prove damages. I really think that it's probably

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1 not even -- it's not a valid measure of damages. But to say
2 that in determining the value that was sold in 1984, you can't
3 look at the income stream that actually happened between 1984
4 and the time of their suit would be a novel way to approach a
5 damages analysis from any kind of, you know, regression
6 analysis that economists do. So I don't know what he's
7 thinking, and I'm not sure how he's going to calculate whether
8 it's 50 percent or 40 percent or 20 percent. And I just --
9 that's the first thing.

10 The second thing: He makes a claim in this case that
11 my client is going to go out and compete against him and he has
12 a Lanham Act claim, trademark claim. In that trademark claim,
13 he suggests that my client, in this same settlement
14 discussion -- he brought it up. I would have never brought it
15 up, your Honor. I don't think it was appropriate. I
16 understand Mr. Wolfsohn has a different point of view, and I
17 respect him, and his point of view, but the bottom line is, he
18 brought up this settlement discussion, and in response to
19 Mr. Buck's comment that they only make \$135,000 a year, she
20 quipped back, well, then maybe we should make him the free
21 agent. And without the context of all of this stuff, it really
22 seems to me you can't say on the one hand that, you know, we've
23 paid more than we were supposed to get and then not figure out
24 how much they made over the last 30-some-odd years with this
25 product. It just -- and really, to me, I don't know why they

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1 would resist that. This is discovery at this point. I'd be
2 happy to keep that confidential. But he's sort of taking away
3 a part of the narrative that he introduced into the case.
4 There's many, many, many parts of this complaint that talks
5 about how we were asking for exorbitant amounts and how they
6 spent millions of dollars on this, that, and the other thing,
7 all of which I have a right, I believe, to contest, and if they
8 send me the information on a spreadsheet, that would be good.

9 THE COURT: Okay. But Mr. Wolfsohn is saying right
10 now that he is only going to seek damages that are based on
11 some percentage of monies that the Phillies have paid to the
12 defendants, and that's it, that he's not looking for any money
13 whatsoever for the value of the Phanatic and the type of income
14 stream it's generated. And so if he's prepared to accept that,
15 which he tells me he is, then I think that does make
16 paragraph 3 or topic 3 irrelevant.

17 MR. MONTCLARE: I don't want to beat a dead horse, and
18 if the Court's going the other way, I'm certainly going to
19 respect the Court's decision. It just seems to me that that is
20 a very open-ended sort of commitment that really doesn't have a
21 lot of information in it for me to contradict. If his idea is,
22 we paid them a million dollars but we should have only paid
23 them 50 cents on the dollar, how is he going to calculate that?
24 He hasn't told you that. How is he going to calculate that?

25 THE COURT: I think what he said is it's going to be

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1 prorated, because what he said to me was, he believes that when
2 he paid however much money he paid to your client, it was to
3 have the rights for the entirety of their life, and if it's
4 being cut off prematurely, then he should have only paid you
5 for the rights that he got, and so by definition, he's capped
6 at some percentage of what he paid your client.

7 MR. MONTCLARE: I understand that, your Honor. I just
8 don't think -- how do you take a pro rata percentage of
9 forever? I mean, it's a circular argument.

10 More important than that, you know, he also alleges
11 that our clients were properly compensated back in 1984, and
12 he's trying to say that as a matter of law, the Copyright Act
13 doesn't permit terminations under those circumstances. We
14 certainly don't agree with that. There's nothing -- it may be
15 in the legislative history as to what generated the statute.
16 There's nothing in the statute that talks about that, but
17 that's what he alleges. In fact, in his first count, his
18 declaratory judgment count, he says, "At the time of the
19 negotiation of the 1984 assignment, H/E had full knowledge of
20 the market value of the work at issue." Well, in order to
21 really understand the market value of the work at issue, in
22 most cases, if we were going to prove what market value was at
23 the time, you would have to -- especially over a period of
24 years, you would have to test it against actual results. And
25 he's taking that out of the case as well. I would like to have

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1 him limit it as much as he can on the damages. We don't think
2 they're worth anything. But this idea that he can sort of, at
3 this point, before we get to arguing any of these damages
4 issues points or expert opinion points, he somehow doesn't want
5 us to know how much they made, sounds to me if it wasn't
6 important, he would probably not object to it.

7 THE COURT: Okay. I'm going to cut you off, because
8 we've already gone a half an hour and we're running out of
9 time.

10 MR. MONTCLARE: Sure.

11 THE COURT: So I'm going to strike topic 3 as a topic
12 for 30(b)(6) deposition. Mr. Montclare, if you want to put
13 something in writing to persuade me that you should be entitled
14 to those documents, I'm happy to entertain that request, but as
15 far as a 30(b)(6) witness, it's going to be stricken. So let's
16 move on.

17 No. 4 talks about authorship and co-authorship and
18 ownership of the Phanatic and any creative contributions that
19 have been made. That seems like a reasonable topic. What's
20 the objection?

21 MR. WOLFSOHN: Your Honor, so the issue under -- the
22 derivative work issue is the one that we quoted the language
23 for in our letter, which is under Section 203(b)(1) of the
24 Copyright Act, and the language there says that the Phillies,
25 after June 15, 2020, may continue to utilize derivative work

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1 prepared before June 15, 2020. So there is an issue about
2 which are the derivative works. The defendants submitted some
3 good law from the Second Circuit on what constitutes a
4 derivative work. It has to be more than a trivial addition to
5 the original work, that has some modicum of creativity. And we
6 have submitted 399 pictures of things that we think are either
7 derivative or they're actually just completely so different
8 from the original Phanatic that they wouldn't be infringing,
9 even if the rights do revert to the plaintiff. Most of those
10 399 were artwork done by the defendants, by Ms. Erickson. So
11 that we're not having to educate somebody on 399 pieces of art,
12 what I've asked Mr. Montclare to do is to identify for me the
13 ones that he thinks are at issue. I don't think he's
14 contending that his own client didn't do something original
15 vis-à-vis the artwork. So that feels to me like a big waste of
16 time and money to try to have somebody at the Phillies explain
17 the originality of his client's artwork.

18 THE COURT: Mr. Montclare, can you accommodate that?

19 MR. MONTCLARE: Pardon me?

20 THE COURT: Can you accommodate that?

21 MR. MONTCLARE: Well, not really. And I'll tell you
22 why in a minute. But he's changing what he offered in his
23 letter to the Court. He offered to provide a witness to
24 testify, to the extent known, to the author of the derivative
25 work that he's put in his 399 documents, and the work, if any,

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1 on which the derivative was based. He offered to do that.
2 It's in topics 4 and 7 in his email. Now he's saying he
3 doesn't want to do that. I don't know -- I certainly know what
4 my own client did, so I'm not asking him to tell me, you know,
5 what my own client did to create their own work. I am asking
6 them to tell me who created -- I want a witness to testify,
7 under oath, as to who created these derivative works and so
8 that he can identify them.

9 We've also asked, just so you know --

10 THE COURT: Why can't you identify the derivative
11 works that you're focused on?

12 MR. MONTCLARE: Well, I don't know which ones that
13 they're really -- I mean, they're seeking a declaratory
14 judgment on 399 works. If they're not important, then he
15 doesn't have to worry about them. But if they're important, we
16 need to have some discovery on them. He even put -- I'm sorry.
17 Go ahead.

18 MR. WOLFSOHN: Thank you, Paul. Dave Wolfsohn again
19 for the plaintiffs.

20 Your Honor, if your Honor had a chance to read the
21 *Durham Industries* case, *Durham v. Tomy*, 630 F.2d 905, your
22 Honor will see that when it comes to visual art, visual work,
23 like what we're talking about here -- we're not talking about
24 music, where you have experts and stuff like that -- the Second
25 Circuit typically says it's basically, I know it when I see it.

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1 The Second Circuit and -- the district court and the Second
2 Circuit will look and compare the work and consider, okay, in
3 what's purported to be the derivative work, is there anything
4 original there that's significant that's been added to the
5 first work? And so all I'm asking Mr. Montclare to do is to
6 tell me, you know, which ones he thinks that he has a question
7 about.

8 Your Honor, I didn't have a chance -- maybe I should
9 have done this, and I apologize. I should have sent your Honor
10 an example of what we're talking about. But there's a
11 distinguished artist in the Philadelphia area who Paul's
12 client's said she totally *[inaudible]*, and he did, you know,
13 dozens of drawings and paintings of the Phanatic in different
14 positions, different contexts, many of them humorous, of
15 course, and, you know, he's a good artist. It's original
16 artwork. It may not be Leonardo da Vinci, but it's definitely
17 adding some originality. I just don't think there's a dispute
18 as to that. Some of them, maybe Mr. Montclare thinks that
19 they're very close or identical to something else, and for
20 those, if he could just narrow it down, you know, we would
21 present a witness or -- if we have one. If we have somebody
22 and we can find artists, we will present a witness to talk
23 about what they think is original that they've added to it.

24 THE COURT: Okay. Well, you know, we're already
25 closing in on 40 minutes, which exceeds what I normally do for

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1 a phone call, and we have another 20 topics to go. I think
2 what we're going to have to end up doing is adjourning this
3 conference, because I don't have the time to go through it one
4 by one with you all now. It does seem to me that you all could
5 do more work to have more conversations about the scope of the
6 derivative claim so that we can narrow it, at least, because
7 even if it's all 399, that's too much for a deposition, and it
8 seems like it undermines the value of the inquiry.

9 MR. WOLFSOHN: Okay. Your Honor, Dave Wolfsohn for
10 the plaintiffs. I was also going to suggest, it seems to me
11 that, you know, they're taking seven depositions of lay
12 witnesses. They're going to have the guy who's the head of
13 merchandising, taking his dep, that's Mr. Brandreth; they're
14 taking his deposition. They're going to take Dave Buck's
15 deposition. He's the executive vice president. They're going
16 to take the former creative person, who retired, but she was
17 the -- contributed a lot of creative ideas to the Phanatic and
18 promotions, and they're taking her deposition. So they're
19 taking all those depositions. And what I would propose, your
20 Honor -- Paul and I will continue to work on this, but what I
21 would propose is that they get through those depositions and
22 then see where they are, see what information they're lacking,
23 and hopefully at that point they can pare these down, and I
24 would understand, yeah, you're right, Paul, you know, the seven
25 lay witnesses knew a lot of stuff, and you got a lot of

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1 answers, but as to these three, four, five topics, there's some
2 information missing, I'll find you a witness on that. So if we
3 could do something like that just with the understanding, you
4 know, I'm not waiving any of my rights, he's not waiving any of
5 his rights, I think we should be able to get rid of a lot of
6 the stuff here and not have to burden the Court with it.

7 MR. MONTCLARE: Yes. This is Paul Montclare. I'm
8 happy to talk to David about this. And I know the Court
9 doesn't have the time. So I think that would be best for us to
10 do in any event, and sorry to burden the Court so much with all
11 of this. But we will try to get through that. And if we can't
12 resolve it, we should probably schedule another conference call
13 with your Honor, if you have time, because I would really like
14 to have this resolved, because we're running out of time on the
15 discovery.

16 THE COURT: That's what I'm trying to look up right
17 now. What's the close of fact discovery?

18 MR. MONTCLARE: March 9th, and I was --

19 MR. WOLFSOHN: Excuse me. Dave Wolfsohn for the
20 plaintiff. And I have not had a chance to discuss this with
21 Paul, but I was thinking, given everybody's schedules and the
22 depositions we have to do, if we could move the whole calendar
23 out two weeks, I think we need that. I think that's probably
24 enough. I haven't discussed it with Mr. Montclare so I don't
25 know if he's okay with that, your Honor.

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1 MR. MONTCLARE: I certainly have no objection. We're
2 running up against deadlines, and we've all been working very
3 hard. It's just that we have to get this thing ended. So yes,
4 I have no objection to that.

5 THE COURT: Okay. Then I'll extend the deadline.
6 I'll give you a little more than two weeks. I'll give you till
7 March 27th, which is a Friday. So --

8 MR. WOLFSOHN: Great. Thank you, your Honor.

9 MR. MONTCLARE: And while we're at it, your Honor,
10 then could we move the expert date out a little bit, because
11 right now it's a day after the close of fact discovery, and
12 that's on for March 10th that we have to start filing expert
13 disclosures.

14 THE COURT: What do you propose?

15 MR. WILLIAMS: That's what I was about to say. Thank
16 you.

17 MR. WOLFSOHN: Dave Wolfsohn again for the plaintiffs.
18 I agree. I wouldn't mind moving the expert disclosures to like
19 a week after March 27th.

20 THE COURT: Can I ask that you all, after this phone
21 call, have a conversation and then file a letter tomorrow with
22 a proposed date. I'll give you till the 27th for fact
23 discovery, and if you can just give me a reasonable schedule
24 for expert discovery.

25 MR. WOLFSOHN: Yes, your Honor, we'll do that.

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1 THE COURT: So before I let you go, let me tell you
2 when I can see you again. The soonest I could see you in
3 court, in person, would be probably the 27th of February, but
4 better for me would be the 4th of March.

5 MR. MONTCLARE: Just a second. I'm looking at my
6 calendar, your Honor. Paul Montclare.

7 Yeah, I think it's all right with me, your Honor.
8 This is Paul Montclare.

9 MR. WILLIAMS: The 4th would be fine.

10 THE COURT: Okay. So let's adjourn the conference.
11 We will reconvene on the question of the scope of the 30(b)(6)
12 topics. That will give you an opportunity to take a few more
13 depositions. I do think that's a good idea, to learn a little
14 bit more. Then you all can probably work to narrow the
15 disputes. If you have narrowed the disputes, you can write to
16 me and say that you want to adjourn the conference. Again, you
17 do seem like you're working well together generally, but if
18 we're going forward with the conference on March 4th, then I
19 would ask you to file a letter for me on March 2nd letting me
20 know the topics that remain in dispute.

21 MR. MONTCLARE: Fair enough.

22 THE COURT: Okay?

23 ALL COUNSEL: Thank you very much, your Honor.

24 THE COURT: Okay. Thank you.

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